(6)

No. 87-6026

In the Supreme Court of the United States

OCTOBER TERM, 1988

HEATH A. WILKINS,
Petitioner,

vs.

STATE OF MISSOURI,
Respondent.

ON WRIT OF CERTIORARI TO THE SUPREME COURT OF MISSOURI

BRIEF OF RESPONDENT

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67 pp

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Constitutional Provisions and Statutes

Miscellaneous

STATUTORY PROVISIONS INVOLVED

Mo.Rev.Stat. §§211.071 and 565.020 (1986) appear as Appendix A of this brief.

STATEMENT OF THE CASE

On July 27, 1985, petitioner Heath Wilkins stabbed to death Nancy Allen, a twenty-six-year-old mother of two, at a convenience store in Avondale, Missouri (Tr. 195, 220-221). At the time of this murder, petitioner was sixteen years and six months of age, having been born on January 7, 1969 (J.A. 5).

A. Procedural History

1. Juvenile Proceedings

Being six months short of the age of majority for purposes of criminal prosecution, Mo.Rev.Stat. §211.021(1) (1986), petitioner was initially within the jurisdiction of the juvenile court. On August 15, 1985, a hearing was held before the juvenile judge on a motion filed by the Juvenile Officer to terminate juvenile-court jurisdiction and certify petitioner for trial as an adult, as provided for under Mo.Rev.Stat. §211.071 (1986) (J.A. 4; Respondent's Appendix A).[1] Thereafter, the juvenile court certified petitioner for trial as an adult, noting among other things the "viciousness, force and violence" of the crime alleged and the fact that petitioner had repeatedly committed criminal acts despite past juvenile treatment programs (J.A. 5). The court further observed that petitioner "is an experienced person, and mature in his appearance and habits to the extent that the juvenile forum and rehabilitative machinery are not adequate for his treatment and confinement" (J.A. 5).

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1. Because petitioner has never previously advanced any challenge to his certification as an adult—let alone claimed that Missouri's certification process renders his death sentence invalid (Pet.Br. 43-45)—no transcript of the juvenile court's hearing was filed with the Supreme Court of Missouri and none has therefore been certified to this Court. See Part IV of respondent's Argument, *infra*.

2. Charge and Competency Hearing

On October 8, 1985, an information was filed in the Circuit Court of Clay County charging petitioner with first degree murder, Mo.Rev.Stat. §565.020 (1986) (J.A. 1-3; Respondent's Appendix A).[2] At the request of petitioner's appointed counsel, the court ordered two separate psychiatric evaluations to be conducted upon petitioner as provided for under Mo.Rev.Stat. §552.030 (1986) (Tr. 4-7; J.A. 7-51). In the course of these examinations, petitioner made known his desire to enter a plea of guilty to the charges and receive a sentence of death (Tr. 12-14, 20-21, 30, 55, 58-59).

On April 16, 1986, a hearing was held on the issue of petitioner's competency to stand trial (Tr. 6-8). The witnesses at this hearing were the two physicians who conducted psychiatric evaluations of petitioner, Dr. Steven Mandraccia of the Western Missouri Mental Health Center and Dr. William Logan of the Menninger Foundation (Tr. 6-40; J.A. 7-51). Dr. Mandraccia testified that petitioner suffered from no "mental disease or defect" as defined by Missouri law,[3] that he fully understood the proceedings against him, including the fact that he could receive the death penalty, and that he was therefore competent to stand trial (Tr. 11-15; see J.A. 9-12). Dr. Mandraccia further stated that this finding of competency

2. Petitioner was also charged in separate informations with armed criminal action, Mo.Rev.Stat. §571.015 (1986), and carrying a concealed weapon, Mo.Rev.Stat. §571.030.1(1) (1986) (Tr. 144-164). All three charges were addressed at petitioner's arraignment, competency hearing, waiver of counsel and plea of guilty (Tr. 3-6, 69, 83-88, 97-100, 105, 144-164, 167-178).

3. Mo.Rev.Stat. §552.010 (1986). This term and its definition derive from the ALI Model Penal Code, §4.01 (Final Draft 1962). The same term appears in the federal statute relating to mental competency, 18 U.S.C. §4241(a), and it has been similarly defined by several federal circuits. See e.g., *United States v. Torniero*, 735 F.2d 725, 728-729 (2nd Cir. 1984); *United States v. Lewellyn*, 723 F.2d 615, 616 (8th Cir. 1983).

was not affected by petitioner's stated preference for the death penalty (Tr. 12-13), and that he believed that petitioner was competent to decide whether or not to enter a plea of guilty (Tr. 14-15).

The testimony of Dr. Logan was somewhat equivocal in that he declined to reach a "definite conclusion" as to petitioner's competency (Tr. 18-19). He found that petitioner understood the charges against him, the range of punishment and the legal options available to him (Tr. 19-20; J.A. 48); that petitioner was of average intelligence and had an accurate and detailed memory of the crime (Tr. 20, 29-30; J.A. 46); and that he had at least a facially rational basis for his decision to plead guilty and receive a death sentence (Tr. 20-21, 30-32, 34-36; J.A. 48-49). Dr. Logan further testified that petitioner's act of murder was "very purposeful, very deliberate [and] very well-planned" and that he was emotionally indifferent to the taking of human life (Tr. 33-34; J.A. 44-45). The only qualification by Dr. Logan as to petitioner's competency was his conclusion that petitioner suffered from "personality disorders" which, while they might not constitute a mental disease or defect, led petitioner to make decisions impulsively and on an emotional rather than a rational basis (Tr. 21-25, 32-33, 39-40; J.A. 22-23, 48-51); in the words of the witness, petitioner could not tolerate frustration or discouragement and preferred a "quick solution" rather than a lengthy trial and incarceration (Tr. 37, 39).

Based upon the above evidence, the Circuit Court, the Honorable Glennon E. McFarland, found petitioner competent to proceed (Tr. 42).

3. Waiver of Counsel and Plea of Guilty

Immediately after being found competent to proceed, petitioner made a *pro se* request to discharge his attorney and represent himself (Tr. 42-43). The reason given by

petitioner for this request was that he wished to plead guilty and receive a sentence of death, and his attorney felt ethically constrained from seeking that end (Tr. 42-43, 46-48, 57-59). A lengthy discussion ensued in which the judge admonished petitioner that retaining the services of an attorney would be in his best interests, to which petitioner responded that he still wanted to proceed *pro se* (Tr. 43-59). The court nevertheless refused to grant petitioner's request and instead gave him seven additional days to reconsider his decision (Tr. 59, 67-68).

A week later, on April 23, 1986, petitioner reappeared before Judge McFarland with his appointed counsel (Tr. 69). In further investigating petitioner's continuing request to represent himself, the court explained to petitioner the murder charge against him, the range of punishment and the bifurcated nature of capital proceedings (Tr. 70-72); listed the numerous matters in which the assistance of counsel would be valuable (Tr. 72-74); and repeatedly encouraged petitioner to change his mind (Tr. 73-74, 79). When petitioner persisted in his request (Tr. 74-82), he was provided by the court with a written waiver of counsel, which he was given an hour to examine (Tr. 82-83; Legal File, hereinafter "L.F.," at 23-24). After filling out and signing the waiver form, petitioner's request to discharge his attorney and proceed *pro se* was granted (Tr. 83-87); however, the court ordered petitioner's former counsel to remain available for consultation or legal advice during court proceedings (Tr. 87-89).

Following the discharge of his attorney, petitioner stated his intention to enter a plea of guilty to first degree murder and the two related charges (Tr. 89-90). In response, Judge McFarland strongly advised petitioner that such a step was "not a good move" or in petitioner's best interests (Tr. 90, 93), and graphically described to

him an execution by lethal gas in suggesting that he reconsider his decision (Tr. 93-95). When petitioner persisted, the court recommended that he "talk to other people about this decision you're having to make" and postponed the taking of any guilty plea for sixteen days, until May 9 (Tr. 95-96). On April 29, petitioner briefly reappeared in court so that he could be provided with a written petition to enter a plea of guilty which advised him of the consequences of such a plea (Tr. 96-104; L.F. 25-30).

On May 9, 1986, petitioner appeared before the Circuit Court and restated his desire to enter pleas of guilty to the offenses charged (Tr. 104-106, 109-113). An extensive record was made regarding the knowing and voluntary character of this decision, during which petitioner was readvised of his pertinent constitutional rights and again admonished regarding the consequences of his plea (Tr. 109-123, 131-144). Petitioner personally described the means by which the murder was committed (Tr. 124-128), and also concurred in a further description of the crime by the prosecutor (Tr. 128-131). Petitioner then signed the guilty plea petition and entered his plea of guilty to first degree murder (Tr. 120-123, 143-144). After this plea of guilty had been accepted, petitioner entered separate guilty pleas to the charges of armed criminal action and carrying a concealed weapon (Tr. 144-164).

4. The Punishment Hearing

The hearing on punishment in this cause was conducted on June 27, 1986 (Tr. 167). Following his sentencing on the two lesser charges (Tr. 175-178), petitioner entered an oral and written waiver of his right to a punishment-phase jury and to the representation of counsel in that proceeding (Tr. 168-175, 179-194; L.F. 31-38).

During the punishment hearing, the state introduced into evidence petitioner's written confession (Tr. 218-227; State's Exhibit 22), and presented other witnesses and exhibits detailing how this crime was committed (Tr. 194-233; State's Exhibits 1-6, 9-13, 16-19, 21). In addition, the state recalled Drs. Logan and Mandraccia to elaborate upon their evaluations of petitioner (Tr. 245-276), and offered voluminous records regarding petitioner's history of treatment as a juvenile (Tr. 233-244; State's Exhibit 24). In the course of the state's case, petitioner interposed several objections either directly or through his advisory counsel, challenging the relevancy or admissibility of some of the evidence offered (Tr. 237-238, 240-241, 257-260, 262-265, 267-269). At the close of the state's punishment evidence, petitioner attempted to call as a witness his codefendant, Pat Stevens, apparently for the purpose of emphasizing petitioner's predominant role in planning and executing the murder (Tr. 277-287); however, Stevens invoked his Fifth Amendment rights on advice of counsel (Tr. 287-289). Closing arguments were presented by both parties, with both sides urging the imposition of a death sentence (Tr. 289-298). Thereafter, the Circuit Court entered written findings of fact in which it concluded that two statutory aggravating circumstances were shown by the evidence beyond a reasonable doubt (Tr. 298-301; J.A. 77). Based upon these aggravating factors, and after considering "all other proper and lawful matters", the court determined that petitioner should receive a sentence of death (J.A. 77).

5. The Appeal

Although petitioner filed no notice of appeal from his conviction and sentence, an appeal to the Supreme Court of Missouri was mandatory by reason of the sentence of death imposed. Mo.Rev.Stat. §565.035.1 (1986).

Because of petitioner's continuing position in favor of the execution of his sentence, the State Public Defender was appointed as *amicus curiae* and directed to brief and argue "any issue subject to review." *State v. Wilkins*, 736 S.W.2d 409, 411 (Mo. banc 1987) (J.A. 80). Following an oral argument at which petitioner appeared and was permitted to make a statement, the Missouri Supreme Court ordered that petitioner be examined to determine whether he was competent to waive the assistance of counsel on appeal. *Id.* The designated physician, Dr. S. D. Parwatikar, concluded that although petitioner was competent to assist an attorney, he was not competent to waive counsel and represent himself before the Supreme Court (J.A. 52-75).[4] As a result, the State Public Defender was appointed as petitioner's counsel on appeal, and the present cause was rebriefed and reargued. *State v. Wilkins, supra* at 411 (J.A. 80). On September 15, 1987, the Supreme Court of Missouri issued an opinion affirming petitioner's conviction and sentence. (J.A. 79-94).

B. The Crime and the Defendant

1. The Facts of the Crime

The details of petitioner's murder of Nancy Allen emerge from his "factual basis" testimony during his plea of guilty (Tr. 124-131), and also from his confession to police which was introduced in the punishment-phase hear-

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4. Even though the report of Dr. Parwatikar was not before the sentencing court, and did not purport to address petitioner's responsibility for his actions at the time of the murder or his competency at the time of the plea, petitioner has continued to cite and rely upon this report in reciting the "facts" upon which the sentencing court's decision was based (Pet.Br. 11, 17, 19). As petitioner acknowledges, a similar attempt was rejected by the Supreme Court of Missouri (Pet.Br. 47, n. 63), and for the reasons discussed in footnote 5, *infra*, it should be rejected here.

ing (Tr. 218-228).[5] The evidence presented to the Circuit Court showed the following: as of July of 1985, petitioner was sixteen and a half years of age and had recently been released from the custody of the Missouri Division of Youth Services on the condition that he go to work for the Job Corps in Utah (Tr. 236-237). Instead, he returned to the Kansas City area and lived "in the streets" (Tr. 219). There, petitioner associated with three other youths: Pat Stevens ("Bo") Ray Thompson ("Shades") and Marjorie Filipiak ("Midget"); petitioner himself went by the nickname "Pyzon" (Tr. 3, 37, 220).

Sometime in mid-July, when Stevens indicated that he needed money, petitioner told the others about a plan he had to get some money by committing a series of robberies at business establishments in the area (Tr. 126, 219-220, 227). Although a gas station and a pizza restaurant were mentioned as possible targets, petitioner's attention focused in particular upon Linda's Liquors and Deli, a small convenience store located in the town of Avondale north of Kansas City (Tr. 129, 220; State's Exhibit 1). In committing these robberies, petitioner's express plan was to murder "whoever was behind the counter," the reason

5. In his account of the facts (Pet.Br. 19-21), petitioner has chosen to ignore or discount his admissions at his plea of guilty and in his confession, and instead relies upon conflicting assertions made to one of his examining psychiatrists (J.A. 25-51). A major difficulty with this attempt is that, as noted by petitioner in an objection made during the punishment hearing (Tr. 257-260), this testimony was admissible only as relevant to petitioner's mental condition and not for the truth of the matters asserted. Section 552.030.5. After petitioner's objection on this basis, the Circuit Court stated that it would not consider the evidence at issue "in connection with defendant's guilt in this case" (Tr. 298-299). The Missouri Supreme Court similarly relied in its opinion upon the facts developed in petitioner's guilty plea and confession, as it was certainly entitled to do. *State v. Wilkins, supra* at 411-412 (J.A. 81-83). This Court has customarily accepted the factual determinations of state courts in cases before it, *California Retail Liquor Dealers Association v. Midcal Aluminum, Inc.*, 445 U.S. 97, 111-112 (1980), and the same principle should apply here.

being that "a dead person can't talk" (Tr. 125-128, 226). To carry out his intention to kill any witnesses, petitioner bought from Pat Stevens a "butterfly knife" (a narrow-bladed martial arts weapon), using the proceeds from his burglary of a laundromat, and sharpened the blade with a file (Tr. 221, 224-225).

At 10:15 p.m. on Saturday, July 27, one to two weeks after forming his plan to rob Linda's Liquors and murder its occupants, petitioner and his three companions met at a nearby hospital in accordance with that plan (Tr. 126, 128-129, 220-221). While Ray Thompson and Marjorie Filipiak waited at the hospital, petitioner and Pat Stevens walked to a creek near Linda's Liquors, where they watched the store for about an hour (Tr. 129, 221). When all of the customers in the store had left, petitioner and Stevens went inside; petitioner ordered a sandwich from Nancy Allen, the store clerk, while Stevens asked to use the bathroom (Tr. 129, 221, 230-231; State's Exhibits 1-5). As Allen made the sandwich, petitioner saw that she was not in a position to be grabbed from behind by Stevens when he came from the bathroom, so he asked for extra lettuce on his sandwich (Tr. 221). Allen then went to a nearby counter, whereupon Stevens came out of the bathroom and grabbed her (Tr. 221, 226). Petitioner produced his butterfly knife, ran around the counter and stabbed Nancy Allen once in the back "where I thought was her kidney" (Tr. 124, 130, 205-206, 211, 221; State's Exhibits 18-19). When the victim fell to the floor, petitioner stabbed her three more times in the chest, aiming for her heart and lungs (Tr. 124, 130, 202-205, 221, 226-227; State's Exhibits 9-12); two of these stab wounds penetrated the victim's heart (Tr. 202-204, 212-213). As Allen lay mortally wounded on the floor, she began talking to petitioner and Stevens (Tr. 130, 221, 226-227). Petitioner told Allen to shut up, and then stabbed her four more times in the

throat to silence her (Tr. 124, 130, 202-204, 213, 221, 226; State's Exhibits 9-11, 16-17). At no time did the victim resist the robbery or struggle in any way; as petitioner put it, "[s]he did not have time" (Tr. 226).

While petitioner was stabbing Allen, Stevens was taking liquor, cigarettes and rolling papers from the store shelves (Tr. 130, 222). In addition, some four hundred and fifty dollars in cash and checks were taken from the cash register (Tr. 222-223, 231-232; State's Exhibit 5). On the way out of the store, petitioner made sure to wipe off the doorknob so as to eliminate any fingerprints (Tr. 227). Petitioner and Stevens returned to the hospital to rendezvous with their two companions, and the group then took two separate cabs to a Kansas City bus station to throw off any pursuit (Tr. 130, 223). After splitting up the loot, they returned to a park area where they customarily lived, again in separate cabs (Tr. 130-131, 223). The body of Nancy Allen was discovered by a police officer shortly after midnight on July 28 (Tr. 194-195, 198-199). A week later, "some guys" came to the area habituated by petitioner and his friends (Tr. 224). Petitioner told Pat Stevens to bring them to a place where he could kill them with his knife (Tr. 224); however, when a police officer appeared, petitioner threw the murder weapon in a lake (Tr. 131, 224). The knife was never recovered (Tr. 131).

2. The Character and History of Petitioner

Considerable evidence was introduced at the punishment hearing regarding the character and prior conduct of petitioner. From the age of eight onward, petitioner was continually in the custody of the juvenile court, and frequently housed in juvenile facilities, because of repeated acts of burglary, stealing and arson (Tr. 234-237, 261, 264; J.A. 8-9, 28-30). Psychiatric reports and testimony also indicated that petitioner had attempted to kill his mother

by putting insecticide into Tylenol capsules (Tr. 262; J.A. 29, 39) and had poisoned or otherwise killed several animals in his neighborhood (Tr. 262; J.A. 29-30). Especially noted were petitioner's complete lack of concern for moral standards of conduct—one commentator described him as having a "Swiss cheese conscience" (J.A. 42)—and his lack of empathy or concern for human life (J.A. 22, 46). In explaining his decision in advance to kill any witnesses, petitioner analogized the murder victim to a trash can: if a trash can is in the way, one can walk around it or kick it out of the way; however, if one walked around it, it would be in the way in the future (J.A. 36).[6]

The psychiatric witnesses and medical records presented at petitioner's punishment hearing indicated that he had had a "chaotic" childhood, had abused drugs over a long period, and suffered from "personality disorders" which could affect his reasoning and judgmental processes (Tr. 269-274; J.A. 8-9, 12-13, 16-22, 28-51). Nevertheless, both witnesses stated that, whatever the quality of petitioner's judgment, he was aware of his actions and that what he was doing was wrong (Tr. 247, 270; J.A. 12-13, 49). The witnesses differed as to whether petitioner's emotional problems were to any extent a factor in mitigation of punishment (Tr. 247-248, 270-274).

On the basis of the above evidence, the Circuit Court found beyond a reasonable doubt that petitioner's murder of Nancy Allen was committed while petitioner was engaged in the perpetration of the felony of robbery, Mo. Rev.Stat. §565.032.2(11) (1986); and that the murder was outrageously or wantonly vile, horrible or inhuman in that

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6. At one point in his initial confession to police, petitioner had claimed that his murder of Nancy Allen was motivated by the fact that she "had made fun of me in the past" (Tr. 219). Later, however, he admitted that this was untrue and that he had made this statement as part of an effort to "play crazy" (Tr. 256; J.A. 36).

it involved depravity of mind, §565.032.2(7) (J.A. 77).[7] The resultant sentence of death was upheld on independent review by the Supreme Court of Missouri. *State v. Wilkins, supra* at 416-417 (J.A. 91-94).

SUMMARY OF ARGUMENT

In the present case, as in *Thompson v. Oklahoma*, this Court is asked to draw a "bright line" under the Eighth and Fourteenth Amendments where no such bright line exists by categorically declaring the death penalty to be "cruel and unusual punishment" for any murder committed by any person who is so much as one day under his seventeenth birthday, no matter what the facts of the crime or the nature of the defendant. While a qualitative distinction based solely on age may be made in general terms with regard to much younger individuals who have not received death sentences in the recent history of the United States, no tenable analysis supports an Eighth Amendment distinction between sixteen-year-old and seventeen-year-old killers merely according to their birthdates.

The thesis that "evolving standards of decency" support the position advocated by petitioner is refuted by a review of objective indicators of public attitudes, the most reliable of which is the legislation enacted by the people's elected representatives. Of the 36 states which currently authorize capital punishment, 22 permit the execution of those who commit a capital homicide at age sixteen. The

7. Petitioner attempts to derive some significance from the fact that the court did not find a third statutory aggravating circumstance pertaining to the murder of a witness, his apparent implication being that the court must have disbelieved petitioner's admission that he killed Nancy Allen to prevent her from being a witness against him (Pet.Br. 20; see Tr. 127-128, 226). The difficulty with this theory is that Nancy Allen was undisputedly not "a witness or potential witness in any past or pending investigation or past or pending prosecution," §565.032.2(12), so this statutory aggravating circumstance was inapplicable to the present case under any construction of the facts.

assumption by petitioner and some opinions in *Thompson* that those age provisions which appear in juvenile transfer statutes rather than capital punishment laws may be disregarded is both legally and factually flawed. This analysis overlooks the fact that the search for "standards of decency" rests upon patterns of legislation, not individual laws, and further that the link between legislation and public standards cannot be proven directly but itself rests upon a presumption that legislators vote the views of their constituents. The presumption that legislators were not oblivious to the existence of capital punishment in their state when they enacted legislation subjecting juveniles to adult criminal penalties is at least as reasonable as the presumption cited above which this Court makes whenever it engages in an Eighth Amendment analysis.

Even aside from this fact, ample evidence exists that the possibility of a death sentence was considered in the enactment of juvenile transfer statutes, and further that this result is publicly supported regardless of the intent of the legislators at the time of passage. Some of the statutes in question make affirmative references to capital punishment or to capital crimes in specifying when juveniles may be tried as adults. Most of the jurisdictions at issue have passed laws which expressly acknowledge the relevance of the defendant's age in determining whether a sentence of death is appropriate. Further, given the repeated instances in which the minimum capital punishment age was raised after a person of lesser age was sentenced to death, the continued existence or reenactment of a juvenile transfer statute after one or more juveniles received a sentence of death in that state is itself significant in determining public attitudes on this question.

The remaining "objective" factors cited by petitioner lend no support to his position. Respondent disputes the assumption that, if it were shown that juries were more

reluctant to sentence sixteen-year-old murderers to death, this would support the notion that such sentences are considered to be "indecent." Precisely the same result would obtain if—as would seem very likely—juries were to believe that the defendant's age is a particularly important mitigating factor in capital cases, to be overcome only in extraordinary circumstances. In any event, no evidence has been offered by petitioner, and respondent finds none, to support the notion that death sentences for those who murder at age sixteen are disproportionately rare when compared with the number of opportunities juries have had to consider imposing this penalty. Petitioner's reliance upon such matters as statements by interest groups on the present issue and laws of other countries is meritless because these are not, by any reasonable measure, reliable objective indicators of public standards in the United States.

Petitioner additionally argues that the imposition of a death sentence upon any sixteen-year-old murderer is inherently disproportionate to his offense. This assertion is refuted by petitioner's complete inability to draw a universally applicable chronological line with regard to when persons are responsible for their actions, or when their culpability is such that capital punishment may be justified. Because of the obvious absence of such a line, petitioner's position is not only unsupported by any "proportionality" analysis, but promotes the arbitrary and freakish imposition of death sentences—premising a defendant's eligibility for capital punishment solely upon a matter of days or months in his date of birth. The bizarre and unjust character of such a distinction is vividly demonstrated in the companion case of *High v. Zant*, in which it is currently unclear whether the petitioner was seventeen or nineteen at the time of the murder for which he was sentenced to death.

Finally, petitioner advances several additional claims in his brief which were not presented to the courts below, were not raised in his petition for a writ of certiorari, or are beyond the scope of this Court's limited grant of certiorari. Under the rules and decisions of this Court, these improperly-presented claims should be disregarded.

ARGUMENT

I. Introduction

In past decisions involving capital punishment, this Court has drawn "bright lines" in Eighth Amendment terms, limiting its infliction to the crime of murder, *Coker v. Georgia*, 433 U.S. 584 (1977); requiring the showing of a specified minimum intent on the part of the defendant, *Enmund v. Florida*, 458 U.S. 782 (1982); *Tison v. Arizona*, 481 U.S. ....., 107 S.Ct. 1676, 95 L.Ed. 2d 127 (1987); and recognizing the longstanding prohibition against execution of the insane. *Ford v. Wainwright*, 477 U.S. 399 (1986). The lines thus drawn were, at least, intuitively clear and reflected some qualitative distinction between those crimes or defendants included and those excluded. In the present case, by contrast, this Court is asked to draw a "bright line" where one does not exist: to hold that, even where an individual has committed an intentional murder, and whatever the circumstances of that murder, his execution cannot be countenanced under the Eighth Amendment if he was as much as one day short of his seventeenth birthday when the murder was committed—although this penalty may well be permissible had he been days or months older at the time of the crime. A review of the pertinent indicators of public attitudes fails to support this distinction, and the sweeping pronouncements by petitioner concerning adolescent development (Pet.Br. 35-42) demonstrate its arbitrary character.

Since petitioner does not and could not claim that the Eighth Amendment, as applied to him by the Fourteenth Amendment, was conceived by its framers to prohibit his execution, *Thompson v. Oklahoma*, ... U.S. ....., 108 S.Ct. 2687, 2714, 101 L.Ed.2d 702 (1988) (Scalia, J., dissenting; hereinafter cited as "dissent"), his reliance of necessity is upon the proposition that "evolving standards of decency which mark the progress of a maturing society" have changed the views of the American public. *Trop v. Dulles*, 356 U.S. 86, 101 (1958) (plurality opinion); see also *Weems v. United States*, 217 U.S. 349, 373-374 (1910). The identification of "evolving standards of decency" by this Court is, as members of this Court have noted, a hazardous proposition in the best of circumstances.[8] Even when emphasis has been placed upon the guidance of this Court's judgment " 'by objective factors to the maximum possible extent,' " *Enmund v. Florida*, *supra* at 788, *quoting Coker v. Georgia*, *supra* at 592, the range of interpretation of these "objective" circumstances has been striking.[9] These facts, and the pernicious consequences of the finding by this Court of an illusory consensus, *Gregg v. Georgia*, *supra* at 176, compel the highest threshold of proof on the part of those who would attack a legislative enactment as violative of "evolving standards of decency." *Id.* at 175.

8. " 'Courts are not representative bodies. They are not designed to be a good reflex of a democratic society.' " *Gregg v. Georgia*, 428 U.S. 153, 175 (1976) (plurality opinion), *quoting Dennis v. United States*, 341 U.S. 494, 525 (1951) (Frankfurter, J., concurring). " '[B]oth in constitutional contemplation and in fact, it is the legislature, not the Court, which responds to public opinion and immediately reflects the society's standards of decency.' " *Furman v. Georgia*, 408 U.S. 238, 383 (1972) (Burger, C.J., dissenting), *quoting* the brief of petitioner in *Aikens v. California*, No. 68-5027.

9. See, e.g., *Tison v. Arizona*, *supra*, 107 S.Ct. at 1696-1697 (Brennan, J., dissenting); and *Thompson v. Oklahoma*, *supra*, 108 S.Ct. at 2716 (dissent), regarding the significance to be accorded states which do not have a capital punishment statute.

Such a standard, by definition, must not be merely a widely-held opinion but a "society-wide consensus" on the issue presented. *Thompson v. Oklahoma*, *supra*, 108 S.Ct. at 2706 (O'Connor, J., concurring in judgment; hereinafter cited as "concurrence"). Absent the "most reliable signs" of such a consensus, one should not be found. *Id.*

Significantly, there is evidence of a society-wide consensus that persons who commit murder below a certain age should not be punished by death for their crimes. No ten-year-old murderers are on any Death Row, and no person of this age has been executed in the United States for more than a century. V. Streib, *Death Penalty for Juveniles* 57 (1987), hereinafter cited as "Streib." The last execution of a person who killed while under age fourteen took place in 1927. *Id.* at 57, 219. Of those youthful murderers now under sentence of death, or who received such a sentence in the past five years, all committed their crimes when at least fifteen and most at sixteen or older. *Id.* at 28-29, 173-176. These facts, and the legislation discussed below, suggest that at some point in the age range between ten and thirteen, a national consensus has formed that executing a youthful defendant would always be "indecent," even though he has committed an intentional killing and whatever the circumstances of that crime.[10]

Since no execution is in prospect for any person committing murder at the above ages—very likely because

10. Even here, a "bright line" is somewhat elusive, since it would appear that criminal juries are very seldom presented with persons fourteen or younger who have been found to have killed with an intent sufficient to permit a sentence of death. In 1987, only 189 individuals of this age were arrested for "murder and nonnegligent manslaughter" in the entire United States. 1987 Uniform Crime Reports: Crime in the United States 174 (United States Department of Justice), hereinafter cited as "Uniform Crime Reports."

of the very societal consensus which this Court seeks—the Eighth Amendment challenges have of necessity focused upon those older murderers approaching the age of eighteen who, statistics suggest, are responsible for a significant percentage of the homicides committed in this country.[11] Respondent submits that no objective basis exists for this Court to find a national consensus against the execution of those who commit intentional murder at age sixteen, and further that such executions serve the same legitimate penological purposes as those imposed upon persons who kill when they are seventeen, eighteen or older.

II. No Society-Wide Consensus Exists That Those Who Commit an Intentional Murder at Age Sixteen Should Not Be Subject to Capital Punishment

A. Public Views As Reflected by "Minimum Age" Statutes

The first factor which has been cited by this Court in its analyses of current standards of decency is the judgment of the various legislatures on the matter in question. *Thompson v. Oklahoma*, *supra*, 108 S.Ct. at 2691 (plurality opinion of Stevens, J.; hereinafter cited as "plurality"). This has been described as the "most reliable" sign of public attitudes, *Id.*, 108 S.Ct. at 2715 (dissent), and it may well be so. If any entity may be said to reflect the views and standards of the public, it must be their elected representatives. *Gregg v. Georgia*, *supra* at 175-176.

Of the 36 states which currently authorize the death penalty, 22—well over half—permit the execution of a person who commits an intentional murder at age sixteen

11. Sixteen-year-olds alone comprised 3% of the total number of those arrested nationally for murder and nonnegligent homicide in 1987, and seventeen-year-olds added another 4%. *Id.*

or younger. Respondent's Appendix B.[12] Petitioner strives mightily to overcome this fact by including in his evaluation those jurisdictions in which no provision for capital punishment exists, and by simply ignoring those jurisdictions in which the age limitation does not appear in the death penalty statutes themselves (Pet.Br. 29).[13] In light of this effort, and given the position of the concurrence in *Thompson v. Oklahoma*, *supra*, respondent offers the following discussion with regard to the pertinent "legislative judgments." *Enmund v. Oklahoma*, *supra* at 788.

1. Jurisdictions With No Current Death Penalty

Petitioner seems to presuppose that any state without a current death penalty statute has necessarily expressed its hostility to capital punishment, and further that this purported public attitude demonstrates a considered judgment that persons under 17 should never be executed (Pet.Br. 29). Neither assumption is valid. It may come as a surprise to the legislative assemblies and citizens of such states as New York, Massachusetts and Kansas that they are recorded by petitioner as in opposition to capital punishment, when all three legislatures have re-

12. In addition, as noted by the dissent in *Thompson*, such executions are permitted for some federal crimes. *Id.*, 108 S.Ct. at 2715. Although legislation is pending in the House of Representatives which would limit the imposition of death sentences for the murder of law enforcement officers to those eighteen or older at the time of the crime, 134 Cong.Rec. H7272-H7274, H7281-H7282 (September 8, 1988), it has yet to become law and in any event would reflect only a judgment that those who commit this particular species of homicide should not suffer death if less than eighteen.

13. Petitioner thus appears to assert simultaneously that (a) legislatures of states in which no execution is possible at any age have taken a position on the appropriateness *vel non* of executing juvenile killers; while (b) legislatures which have passed statutes which actually govern such capital proceedings have not. The inconsistency in such an argument is breathtaking, and becomes even more so when the latter statutes are examined.

peatedly enacted death penalty legislation which was later vetoed by the state's chief executive or overturned by state courts on state constitutional grounds.[14] Even aside from this, petitioner fails to explain what occasion would exist for considering the nature and status of juveniles when prohibiting executions irrespective of age; or why this unsupported assumption should be adopted as a "reliable" objective indicator of public views on the present issue. In past Eighth Amendment analyses involving capital punishment, majority opinions of this Court have reviewed legislation in those jurisdictions in which the death penalty was then available. *Enmund v. Florida, supra* at 789-793; *Tison v. Arizona, supra,* 107 S.Ct. at 1685-1686. The same principle should apply here.

2. Juvenile Transfer Statutes Generally

When a similar analysis was conducted by this Court in *Thompson v. Oklahoma, supra,* it was noted that in 19 states the minimum age at which one could receive the death penalty derived from juvenile statutes setting a minimum age at which a juvenile could be prosecuted as an adult, and not from a specific provision in the state's capital punishment statute. *Id.*, 108 S.Ct. at 2694-2695 (plurality).[15] The plurality elected to disregard these jurisdictions in its legislative review. *Id.*, 108 S.Ct. at 2695-2696. The concurrence expressed concern that

14. Polls in New York indicate that, in the face of the Governor's "continuously-exercised" veto, 80-85% of persons of voting age support the death penalty. Lane, "Legislative Process and Its Judicial Renderings: A Study in Contrast," 48 U.Pitt.L.Rev. 639, 643 (n. 14) (1987). For an account of the Massachusetts experience, which has included not only repeated capital punishment legislation but a state constitutional amendment passed for the express purpose of upholding this penalty, see *People v. Drake,* 748 P.2d 1237, 1262-1263 (Colo. banc 1988) (concurring opinion).

15. Since Vermont no longer has a death penalty for homicide, 13 Vt.Stat.Ann. §2303(a) (Cum.Supp. 1988), the number of these jurisdictions is now 18.

this Court had not been shown evidence that the legislatures had "directly considered" the capital punishment ramifications of these laws and, based upon the absence of affirmative proof of a deliberate choice, held that the Eighth Amendment barred executions of fifteen-year-old murderers unless a minimum age appeared specifically in the capital punishment statute. *Id.*, 108 S.Ct. at 2707-2708, 2711.

As discussed below, respondent submits that substantial evidence has been overlooked that the legislatures in question intended precisely what they enacted, and that the unprecedented significance accorded to the placement of these laws in the statute books is unwarranted. Even were this not so, however, respondent would note its emphatic dispute with the notion that such independent proof of intent is required, or ought to be required, for purposes of Eighth Amendment analysis. By definition, this Court's examination of objective indicators for "evolving standards of decency" rests upon *presumptions*: with regard to legislation, the necessary presumption is that legislators pass laws in accordance with the opinions and standards which prevail among those who elected them. While this is valid as a general assumption, it is by no means always true, particularly in such deeply emotional and divisive areas as capital punishment where legislators may tend to vote their personal views.[16] Nevertheless, the presumption has sufficient general validity when applied to *national patterns* of legislation, as opposed to individual laws, which is all that is required for Eighth Amendment analysis of public standards of decency. To require "proof" that lawmakers voted according to the views of their constituents would be the same as eliminating legislation as a factor for this Court to consider, since such proof could never

16. For an example of this phenomenon involving capital punishment, see Lane, cited *supra* at note 14, at 643.

be supplied.

The same principles apply to the juvenile transfer statutes at issue in this case. It may certainly be said that all possible ramifications of a law may not be considered at the time of its passage. However, it is particularly difficult to presume that, in passing a law subjecting juveniles to general criminal prosecution, legislators were oblivious to the fact that capital punishment was an available criminal penalty in their jurisdiction. By its very nature, the death penalty has always been a sanction very much in the public eye: it is associated with the most heinous and notorious criminal cases, and has been the subject of longstanding public debate. By the same token, public attention has been called to the issue of executing juveniles by a number of cases in many states in which persons of this age have received sentences of death; indeed, this Court has encouraged such attention and debate since at least 1982, when it first granted review on this very issue. *Eddings v. Oklahoma,* 455 U.S. 104 (1982); see also *Bell v. Ohio,* 438 U.S. 637 (1978), in which a similar claim was raised but not decided. In short, it is implausible (to say the least) to suggest that a legislature which enacted a law permitting the criminal prosecution of juveniles as adults failed to contemplate that these individuals might thereby receive a sentence of death—let alone to presume such an oversight by the legislatures in 18 states.

A second dispute with the approach taken by the concurrence in *Thompson* is that it seems to assume that legislators' reflection of and responsiveness to public views terminates after a law is passed. To choose a vivid and obvious example, if a legislature were somehow to pass a law which permitted the practice of human sacrifice—and whether or not the lawmakers were aware at the time of passage that this was the effect of their legislation—there

can be no doubt that public response would ensure its speedy repeal, most especially so if in the interim human sacrifice had been practiced. To demand affirmative proof of legislative purpose at the time of its enactment overlooks the fact that it is *society's* views which this Court is ultimately seeking to identify, not the legislature's, and that these views may be shown not only by the passage of a law but also by its continued existence and exercise. As discussed below, examples abound in which sentences of death upon youthful killers has led to a modification of the minimum age at which death sentences are permitted.

For all of the above reasons, respondent submits that it is at least as reasonable to presume that the minimum ages set out in juvenile transfer statutes were intended to extend the possibility of capital punishment to juveniles as it is to presume—as this Court has and must—that legislative acts reflect public standards. If presumptions of this character are not made, then any "objective" aspect of this Court's evaluation of the purportedly evolving standards of society vanishes.

3. Juvenile Statutes Which Refer to the Death Penalty or a Capital Offense

Further evidence against presuming that legislatures enacting juvenile certification laws did not consider the possibility of sentencing juveniles to death, or in countering such a presumption if it were indulged in, arises from a review of the pertinent statutes. The Florida statute providing for the trial of juveniles as adults, for example, states in pertinent part as follows:

> "1. A child of any age charged with a violation of Florida law *punishable by death* or by life imprisonment shall be subject to the jurisdiction of the court as set forth in §39.06(7) unless and until an indictment on such charge is returned by the grand jury. When an indictment is returned, the petition

for delinquency, if any, shall be dismissed. The child shall be tried and handled in every respect as if he were an adult:

a. On the offense *punishable by death* or by life imprisonment. . . .

* * *

3. If the child is found to have committed the offense *punishable by death* or by life imprisonment, *the child shall be sentenced as an adult.*" (Emphasis supplied). Fla.Stat.Ann. §39.02(5)(c) (Supp. 1988).

One could scarcely question, upon reading this statute, that the legislature contemplated and fully intended that juveniles could be sentenced to death if convicted of a capital murder under Florida law. Yet this and every other juvenile transfer statute was disregarded by the plurality and the concurrence in *Thompson*, and the sweeping language in the concurring opinion that the minimum age must appear in the "capital punishment statute" (*Id.*, 108 S.Ct. at 2711) would seem to consign it to constitutional oblivion.

Similar strong evidence of the legislature's intent is presented by those juvenile statutes which set a variety of minimum prosecution ages according to the seriousness of the crime charged, and expressly include that state's capital homicide within this scheme. For example, Montana law provides that a juvenile may be charged as an adult for such offenses as negligent homicide, arson, assault or robbery only if he was at least sixteen years of age at the time of the conduct alleged. Mont.Code Ann. §41-5-206(1)(a)(ii) (1987). However, this minimum age is reduced to twelve for those charged with deliberate homicide—the only capital offense in Montana, Mont.Code Ann. §45-5-102 (1987)—and several other homicide and sexual offenses. §41-5-206(1)(a)(i). To the same effect are 10 Del.Code Ann. §938(a) (1975), which states a minimum prosecution age of sixteen except for those charged with

the capital crime of first degree murder, 11 Del.Code Ann. §§636 and 4209 (Repl. 1987), and two other offenses; La. Rev.Stat.Ann. §13:1570(A)(5) (1986), permitting the criminal prosecution at fifteen of those who commit the capital offense of first degree murder, La.Rev.Stat.Ann. §14:30 (1986), and other degrees of homicide or rape while reserving other prosecutions for those over sixteen; and S.C.Code Ann. §20-7-430 (1985), which sets several age limits for different charges and circumstances but expressly excludes from such age limitation charges of "murder or criminal sexual assault." Once again, no credible reason appears for assuming that a legislature which expressly provides that a juvenile may be tried for a crime carrying the death penalty somehow failed to contemplate the possibility of a sentence of death.

4. States Which Expressly Recognize the Importance of Age in Capital Sentencing

A similar difficulty arises in presuming that legislatures gave no thought to the possibility of death sentences for juvenile murderers when most of the jurisdictions in question have enacted statutes which specifically acknowledge the link between the defendant's age and the appropriateness of capital punishment. Of the 36 states with capital punishment, 29 expressly list the defendant's age as a mitigating factor to be considered when appropriate. Respondent's Appendix C. Fourteen of the 18 jurisdictions in which the minimum execution age is stated in the juvenile transfer statute have passed such a provision.[17] Even when the juvenile statute does not on its face reflect consideration of capital punishment, as in the examples discussed previously, it is manifestly inconsistent and im-

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17. Alabama, Arizona, Arkansas, Florida, Louisiana, Mississippi, Missouri, Montana, Pennsylvania, South Carolina, Utah, Virginia, Washington and Wyoming.

plausible to suggest that legislators on the one hand considered the defendant's age in the context of the death penalty, yet on the other hand ignored the death penalty when passing a criminal statute relating to the defendant's age.

5. Laws in Jurisdictions Where Persons Age Sixteen or Under Have Been Sentenced to Death

As phrased by the concurrence in *Thompson*, the juvenile transfer statutes under discussion here make capital punishment "at least theoretically applicable" to persons who commit a capital homicide at age fifteen. *Id.*, 108 S.Ct. at 2707. However, the experience of a number of these states has been considerably less theoretical than this language suggests, and legislatures have displayed considerable sensitivity to public attitudes in adjusting minimum-age statutes after actual experience. In 1986, a fifteen-year-old female was sentenced to death for murder in Indiana. Streib, *supra* at 174. Less than a year later, the Indiana legislature passed a bill amending the murder statute to prohibit sentences of death for those persons under age sixteen when the crime was committed. Ind. Code Ann. §35-50-2-3(b) (Supp. 1988), as effective September 1, 1987. Similarly, Kentucky raised its minimum age to sixteen following a death sentence given a fifteen-year-old, *Ice v. Commonwealth*, 667 S.W.2d 671, 672 (Ky. 1984); Ky.Rev.Stat.Ann. §640.040(1) (Supp. 1987), as effective July 1, 1987; and North Carolina greatly restricted the circumstances in which persons who commit murder under age seventeen could be sentenced to death following a death sentence upon a fifteen-year-old killer. Streib, *supra* at 176; N.C.Gen.Stat. §14-17 (Supp. 1987), as effective July 29, 1987.

Of the 18 jurisdictions in which the minimum age for execution is currently stated in the juvenile transfer statutes, eight[18] have had at least one defendant under sentence of death since 1982 for murders committed at age sixteen or younger. Respondent's Appendix B; Streib, *supra* at 28-29; Petitioner's Appendix C. Missouri is one such jurisdiction.[19] If petitioner's thesis is correct that the execution of such persons is beyond the pale of "evolving standards of decency," one would certainly expect in light of the above experience that public opprobrium would have resulted in the repeal of at least one of the statutes permitting such executions in these eight states. Not only has this not occurred, but six of these eight jurisdictions (excluding Alabama and Arkansas) have enacted or amended these statutes between 1980 and 1988 *without change* in the pertinent minimum age provision.[20]

6. Death Penalty Statutes Stating a Minimum Age

It is undisputed that those jurisdictions with death penalty statutes which expressly state an age below which one who commits murder cannot be sentenced to death are highly relevant to the present issue. Four states with statutes of this type (Indiana, Kentucky, Nevada

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18. Alabama, Arkansas, Florida, Louisana, Mississippi, Missouri, Oklahoma and Pennsylvania.

19. Additional evidence with regard to the intent of the Missouri General Assembly should be noted. Although this state's capital punishment laws as enacted in 1977 were taken directly, and to some extent verbatim, from the law of the State of Georgia, compare Mo.Rev.Stat. §565.012.2 (1978) (repealed effective 10-1-84) with the equivalent Georgia statute cited in *Gregg v. Georgia*, *supra* at 165 (n. 9), Missouri did not adopt Georgia's statute limiting execution to those committing murders at age seventeen or older, which was also in effect at that time. Ga.Code Ann. §17-9-3 (1982); see 1963 Georgia Laws at 122.

20. Of the 18 states with juvenile transfer statutes which permit the execution of persons who commit murder at age sixteen or below, 12 have passed or amended their statutes on this subject between 1980 and 1988: Florida, Idaho, Louisiana, Mississippi, Missouri, Montana, Oklahoma, Pennsylvania, South Carolina, Utah, Virginia and Wyoming.

and North Carolina) permit the imposition of such sentences upon killers age sixteen or below. All four of these statutes have been passed or amended in the last three years. Thus, petitioner's thesis that the standards of American society have recently "evolved" to exclude the possibility of his execution is directly contradicted by the above legislation.

B. Public Views As Reflected in Other Statutes

Considerable significance was accorded by the plurality in *Thompson v. Oklahoma, supra,* to age limitations on matters having nothing to do with criminal prosecution or capital punishment. *Id.*, 108 S.Ct. at 2692-2693, 2701-2706. Petitioner has gone to prodigious lengths to set out each and every Missouri statute which states a minimum age for some activity, with the specified ages ranging from four to twenty-one (Pet.Br. 28; Petitioner's Appendix H). No doubt this exercise could be performed in any other jurisdiction.

The significance of these laws as "reliable" objective indicators of public attitudes regarding the execution of youthful killers is nonexistent. In the first place, as correctly noted by the *Thompson* dissent, *Id.*, 108 S.Ct. at 2718 (n. 5), statutory age limitations are directed to the particular status or activity to which that statute pertains—that is the very reason why so many different minimum ages exist. In Missouri, for example, one is presumed to be a competent witness in many criminal cases at age ten,[21] may be held criminally responsible for one's acts at fourteen,[22] can receive a driver's license at sixteen,[23] yet cannot vote or marry without parental

21. Mo.Rev.Stat. §491.060(2) (1986). For some classes of crimes, a person of any age may testify.

22. Mo.Rev.Stat. §211.071 (1986).

23. Mo.Rev.Stat. §302.060(2) (1986).

consent until age eighteen[24] and cannot sit on a jury until age twenty-one.[25] How can these age limits be divorced from the conduct they govern? Would petitioner seriously suggest (for example) that the fact that fourteen-year-olds may be criminally prosecuted throws some light upon the views of the Missouri populace as to the age at which a youth may vote? If such a profoundly speculative and unsupported analysis were to be undertaken, what particular minimum age statute particularly represents societal standards as to the "right" age to capitally punish youthful killers? To say the very least, such an attempt is considerably more tenuous than the presumption which the plurality and concurrence in *Thompson* declined to make: that the legislatures which enacted juvenile transfer statutes intended to allow those tried as adults to receive the full range of available criminal penalties, including capital punishment.

The second major defect in petitioner's reliance upon general age limit statutes is that he completely fails to distinguish between two different types of these provisions: those which deal with age groups purely as a class and those which require inquiry into each individual of the specified age. No matter how intelligent, sophisticated and well-informed a seventeen-year-old may be, he is not permitted to vote in any state in the Union; no provision exists in any jurisdiction for exceptions to the voting age restriction on this or any other ground. The same applies to jury service, purchase or consumption of alcohol, and virtually all of the age limitations listed in petitioner's Appendix H. Of necessity, these statutes reflect a legislative judgment that *most* persons

24. Mo.Const., Art. VIII, §2 (as amended 1974); Mo.Rev.Stat. §451.090.2 (1986).

25. Mo.Rev.Stat. §494.010 (1986).

of the designated age are competent to perform the designated activity or bear the specified responsibility.

In sharp contrast are those few statutes that simply provide the possibility that youths of a given age will be treated as adults, the principal example being juvenile transfer statutes. These provisions need not rest on assumptions as to the competency or responsibility of a particular age group as a class, since each individual will be separately evaluated according to specified judicial or legislative criteria. Thus, if it can be contemplated that *any* person of a particular age might warrant treatment as an adult, inclusion of that age in the juvenile transfer statute is appropriate. Significantly, the minimum ages at which a juvenile may be prosecuted as an adult are considerably lower than categorical limitations such as when a person may vote and, as noted by the dissent in *Thompson*, the trend is to reduce such minimum ages still lower. *Id.*, 108 S.Ct. at 2716 (n. 3).

Beyond dispute, the age limitation under review by this Court is of the latter character. Like any sixteen-year-old killer under sentence of death in any state, Heath Wilkins was not selected at random off the street to receive this penalty. Rather, he was the subject of individualized consideration as to whether he should be prosecuted as an adult (J.A. 4-6), and as to whether he committed the murder for which he was charged (J.A. 76-77). Even after being found guilty, he was not automatically sentenced to death, but received a punishment hearing at which factors in aggravation and mitigation of punishment, including his age, were considered. That being the case, it is fallacious and misleading for petitioner to rely upon statutes which treat sixteen-year-olds as a class, and further which have nothing whatever to do with the criminal prosecution or capital punishment of such individuals.

C. Public Views As Reflected by Jury Verdicts

"The second societal factor the Court has examined in determining the acceptability of capital punishment to the American sensibility is the behavior of juries." *Thompson v. Oklahoma, supra,* 108 S.Ct. at 2697 (plurality).[26] In order for jury verdicts to serve as an "objective" indicator of public standards, the presumption of this Court must be that if death sentences are returned proportionately less often for those who commit murders at age sixteen than for murderers as a whole, this would provide evidence that society in general considers the execution of sixteen-year-old killers to be "indecent."

Respondent disputes this thesis. The youth of the defendant may be considered as a mitigating factor in any jurisdiction. *Eddings v. Oklahoma, supra,* and the vast majority of states expressly list it as one in their capital punishment statutes. Respondent's Appendix C. Just as legislatures have focused in particular upon the age of the defendant as a mitigating circumstance, juries may well have concluded that age is a particularly important mitigating factor in the case of a defendant who commits murder at age sixteen, and that only the most compelling circumstances in aggravation will overcome this consideration. Such a conclusion would have nothing to do with the proposition that executing sixteen-year-old murderers is inherently unacceptable, yet it also would lead to a proportionate reduction in persons of this age under sentence of death. This conceptual defect in analyzing jury ver-

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26. Although this Court has repeatedly made reference to "juries" imposing death sentences, respondent finds no indication that it has separated out those capital cases in which the sentence was imposed by a judge. See *Enmund v. Florida, supra* at 794-796; *Thompson v. Oklahoma, supra,* 108 S.Ct. at 2697-2698. Absent any means of determining which capital sentences were returned by a jury and which by a judge alone, respondent will review these sentences as a whole.

dicts has been noted but not resolved in past decisions of this Court. *Gregg v. Georgia, supra* at 182; *Coker v. Georgia, supra* at 597; *Enmund v. Florida, supra* at 819 (O'Connor, J., dissenting); *Thompson v. Oklahoma, supra,* 108 S.Ct. at 2717-2718 (dissent). Unless some means were to exist to distinguish between a judgment that death sentences for those who kill at age sixteen should rarely be imposed, and a judgment that these sentences are abhorrent in the eyes of society, it is difficult to view punishment verdicts as an "objective" indicator of evolving standards of decency under the Eighth Amendment.

Even aside from this difficulty, respondent finds no instance in the past decisions of this Court, including *Thompson v. Oklahoma, supra,* in which it was shown that juries were actually less likely to return a death sentence upon a challenged class than they were upon capital defendants as a whole. Most frequently, all that has been offered are statistics indicating that the class was a small percentage of those on Death Row or of those who had been executed. *Enmund v. Florida, supra* at 794-796; *Thompson v. Oklahoma, supra,* 108 S.Ct. at 2697. Yet these figures are meaningless if not positively misleading without some knowledge of the juries' *opportunity* to impose a death sentence upon members of the challenged class as compared with defendants generally. A vivid example of this involves the number of women under sentence of death. As of August 1, 1988, there were 22 women on Death Rows nationally and more than two thousand men. "Death Row, U.S.A.," NAACP Legal Defense and Educational Fund, Inc. (August 1, 1988). A superficial look at these figures would permit an argument that juries refuse to sentence women to death and have thus strongly indicated societal revulsion at this practice. The unreliability of this conclusion, and the misleading character of the above statistic, is demonstrated by indications that the vast

majority of persons prosecuted for homicide are men.[27] By the same token, whatever public views may be on the execution of those who commit murder at age sixteen, they are not shown simply by the number of such persons under sentence of death.

1. Persons Under Sentence of Death Nationally

The sole "reliable" means of determining whether punishment juries were disproportionately reluctant to impose sentences of death upon sixteen-year-old killers is to find the percentage of cases in which, when the death penalty is sought against those who commit murder at age sixteen, that penalty was actually imposed; and to compare that with the same percentage of defendants of all ages. See *Thompson v. Oklahoma, supra,* 108 S.Ct. at 2708 (concurrence). The brief of petitioner offers nothing of the kind, but rather the customary and meaningless litany of how few persons who commit murder at sixteen are on Death Row (Pet.Br. 32).

The only attempt known to respondent to evaluate jury sentences in light of jury opportunities to sentence appears in the plurality opinion of *Thompson v. Oklahoma, supra,* in which such sentences are compared with arrests for murder or nonnegligent homicide. *Id.*, 108 S.Ct. at 2697 (n. 39). The difficulty with this comparison (aside from the obvious fact that the vase majority of those arrested for these crimes never reach the stage at which capital punishment is or could be sought) is that it is inherently skewed against juveniles. Unlike adults, an unknown percentage of persons of juvenile age, even those accused of some degree of homicide, will remain in the juvenile justice system and thus will never be eligible for any criminal penalty. Obviously, this is not true of adults. Thus the

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27. In 1987, for example, 88% of all persons arrested for murder or nonnegligent homicide were men. 1987 Uniform Crime Reports at 181.

proportion of sixteen-year-old arrestees who might eventually be considered as appropriate subjects for the most severe criminal penalty will inevitably be smaller than that of persons of all ages.

In short, no showing has ever been made that (a) juries in capital cases have been particularly reluctant to sentence sixteen-year-old murderers to death; or (b) if this had been established, that it would be an expression of a societal consensus that such sentences are unacceptable rather than the proper consideration of the defendant's youth as an important factor in mitigation of punishment. Without proof—or at the very least some relevant evidence—as to both propositions, the "behavior of juries" cannot possibly be an objective factor in evaluating the current scope of the Eighth Amendment.[28]

2. The Missouri Experience

Lacking any evidence of a national reluctance on the part of sentencing juries to return death sentences upon those sixteen-year-olds who commit a capital homicide, petitioner seeks such evidence in cases tried in the State of Missouri. In Missouri, summaries are required to be kept of all capital cases to facilitate the Supreme Court of Missouri's proportionality review, Mo.Rev.Stat. §565.035.6 (1986), and petitioner has employed these summaries to list each and every case in which a capital charge was filed against a defendant for homicides committed at age sixteen or younger (Pet.Br. 31; see the petitioner's brief in *High v. Zant*, No. 87-5666, Appendices S and T).

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28. For the above reasons, and further because they are distant and collateral to the subject under discussion, the "behavior of juries," respondent discounts the statistics regarding actual executions. See *Thompson v. Oklahoma, supra*, 108 S.Ct. at 2717-2718 (dissent). Given the extraordinary delays in the carrying out of death sentences, and the relatively small proportion of sixteen-year-old murderers on Death Rows nationally (Petitioner's Appendix E), it is hardly surprising that such executions are an uncommon occurrence.

Since the reimposition of capital punishment in Missouri in 1977, there have been only three opportunities in this state to consider whether particular individuals who were found guilty of capital homicide for crimes committed while age sixteen or younger should be sentenced to death. In the case at bar, petitioner was sentenced to death for reasons which amply appear of record. In two other cases in which the death penalty was sought for murders committed at the same age, juries returned sentences of life imprisonment. *State v. Allen*, 710 S.W.2d 912 (Mo.App., W.D. 1986); *State v. Scott*, 651 S.W.2d 199 (Mo.App., W.D. 1983).[29] Viewing capital prosecutions in Missouri as a whole, the Missouri Supreme Court's case summaries indicate that juries have had 138 opportunities to consider whether a sentence of death should be imposed, and have returned such a sentence in 66 of these instances, 48% of the time.

While petitioner may wish to argue that only "one-third"—one out of three—of those his age received a death sentence, this is manifestly too small a sample to permit an evaluation of public views in this state. If anything, the fact that only 3 out of 138 Missouri cases in which a death penalty was sought involved a sixteen-year-old defendant greatly assists in explaining why few persons committing capital homicides at this age are under a sentence of death.

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29. Petitioner does not explain what possible relevance exists in his listing of cases in which the juries were not permitted to consider a sentence of death because the defendants were acquitted or convicted of noncapital crimes (Pet.Br. 31). Nor does a scintilla of evidence exist that the decisions to waive the death penalty cited in his brief rested upon the age of the defendant. According to the capital case summaries promulgated by the Missouri Supreme Court, the death penalty has been waived in 39% of all first degree murder prosecutions since 1977—slightly higher than the percentage of such waivers for murderers of petitioner's age as listed in his brief (Pet.Br. 31).

For the reasons discussed above, no basis exists for a finding that patterns of jury verdicts support petitioner's Eighth Amendment claim.

D. Other Purported Measures of Public Views

Finally, resort is made to a number of other factors which, it has been claimed, throw some light upon "evolving standards of decency" in the United States as pertaining to cruel and unusual punishment. Pet.Br. 33-34; see *Enmund v. Oklahoma, supra* at 796 (n. 22); and *Thompson v. Oklahoma, supra,* 108 S.Ct. at 2696 (plurality).

1. Statements of Professional or Interest Groups

In the plurality opinion of *Thompson,* reliance was placed upon the views of "respected professional organizations" which had stated their opposition to the execution of those who committed murder below a certain age. *Id.* Petitioner cites these and similar organizations (Pet.Br. 33). Unsurprisingly, a large number of other groups, most of which oppose capital punishment at any age, have volunteered their services in performing this analysis. See, e.g., the *amicus curiae* brief of the American Baptist Churches, *et al.*, at 26-38.

If this Court were making a legislative judgment as to whether those who commit a capital homicide at age sixteen should be eligible for the death penalty, the views of "respected professional organizations" might well be relevant, both as arguments on the merits of the proposed legislation and as an expression on behalf of the small segment of society which such groups represented. However, it has nowhere been explained how the views of individual interest groups are reliable "objective factors" in judging whether a national consensus exists against the execution of sixteen-year-old killers. By definition, positions taken on behalf of a particular organization represent

(at best) the opinion of its members, not society as a whole.[30] Since no need exists for those entities which approve of an existing practice to formally state that fact, resolutions of this character inevitably represent the voices in opposition.

As this Court has acknowledged, it is not designed or intended to reflect the views of society, as are legislative or other representative bodies. *Gregg v. Georgia, supra* at 175-176. In paying heed to these groups which have gone to the effort of expressing formal opposition on the present issue—particularly those whose expressions seem timed and tailored to influence the judgment of this Court (see Pet.Br. 33)—it runs an unjustifiable risk of mistaking the clamor of organized protest for a settled national consensus.

2. Polls

It has been suggested that the utility of public opinion polls in ascertaining standards of decency "cannot be very great." *Furman v. Georgia, supra* at 361 (Marshall, J., concurring). Whether or not this is so, no survey cited by petitioner or known to respondent supports a finding of a prevailing "standard of decency" against the execution of youthful murderers. Although no known national poll has been conducted on this subject for more

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30. Respondent finds no contrary assertion in the *amicus curiae* brief of the American Bar Association, one of the organizations relied upon by the plurality in *Thompson.* Claims by other amici to represent the views of society (see the *amicus curiae* brief of the American Baptist Churches, *et al.*, at 26-38) vividly demonstrate the unreliability of the present analysis. Despite the fact that virtually all of these entities have stated their categorical opposition to capital punishment (*Id.* at 4-18), this Court has recognized on the basis of ample objective evidence that the views of society are decisively to the contrary. *Tison v. Arizona, supra,* 107 S.Ct. at 1686; *Gregg v. Georgia, supra* at 176-182.

than twenty years,[31] recent surveys of particular geographic areas or professional groups generally indicate that between one-third and one-half of those questioned support such executions. Streib, *supra* at 33-34; Hill, "Can the Death Penalty Be Imposed on Juveniles: The Unanswered Question in *Eddings v. Oklahoma*," 20 Crim. Law Bull. 5, 17-18 (1984), hereinafter cited as "Hill." Assuming for the sake of argument that this represents the national view, the fact that more than one person in three supports the practice challenged by petitioner manifestly refutes the notion that a national consensus exists against the execution of those who commit a capital homicide at age sixteen.

The issue before this Court is not, as petitioner might have it, whether a majority of the public supports or opposes the death penalty in these circumstances, but whether it is "generally abhorrent to the conscience of the community." *Thompson v. Oklahoma, supra*, 108 S.Ct. at 2697 (plurality). The available surveys of public opinion support the opposite conclusion.

3. Laws of Other Nations

This Court has stated that "'[T]he climate of international opinion concerning the acceptability of a particular punishment' is an additional consideration which is 'not irrelevant.'" *Enmund v. Florida, supra* at 796 (n. 22), quoting *Coker v. Georgia, supra* at 596 (n. 10). It is difficult to dispute a proposition so strenuously qualified. Nevertheless, respondent submits that it is truly perilous for this Court to abstract the societal mores of

31. A 1965 Gallup poll, conducted while support for capital punishment was at its lowest ebb, found that only 45% of those responding supported the death penalty and 23% favored it for persons under twenty-one years of age. Streib, *supra* at 33. In a similar poll conducted in 1936, the same figures were 61% and 46%, respectively. *Id.* Support for capital punishment appears to have almost doubled since the 1965 poll. See, e.g., footnote 14, *supra*.

other nations, individually or collectively, and to attempt to apply them in finding "standards of decency" in the United States.

No better evidence could be supplied of the misleading character of this analysis than an examination of the countries cited as particularly significant by the plurality in *Thompson*: the nations of Western Europe and those others which share an Anglo-American heritage.[32] *Id.*, 108 S.Ct. at 2696. According to the *amicus curiae* brief of Amnesty International, 19 of these 22 countries have no death penalty for "ordinary" crimes (excepting offenses committed in wartime or some similar circumstance inapplicable to the case at bar), and the remaining three have had no executions for at least the past ten years. *Id.* at Appendix A-1 through A-7. If these figures were extrapolated to the United States, one would expect nationwide opposition to the imposition of capital punishment for any "ordinary" homicide. In fact, one finds precisely the opposite. *Tison v. Arizona, supra; Gregg v. Georgia, supra.*

The danger in such cross-national comparisons lies not only in substantial differences in culture and heritage, but in the very nature of crime in other countries. According to available figures, the per capita homicide rate in the United States would appear to be from two to ten times that of virtually all of the nations discussed above.[33] How can it possibly be said that this fact is

32. Respondent's list of these countries would consist of Australia, Austria, Belgium, Canada, Denmark, Finland, France, Greece, Ireland, Italy, Liechtenstein, Luxembourg, Monaco, the Netherlands, New Zealand, Norway, Portugal, Spain, Sweden, Switzerland, the United Kingdom and West Germany.

33. Landau, "Trends in Violence and Aggression: A Cross-Cultural Analysis," 22 Annales Internationales de Criminologie (International Annals of Criminology) 119, 130-131 (1984); Wolfgang and Zahn, "Homicide: Behavioral Aspects," 2 Encyclopedia of Criminal Justice 849, 850-851 (1983).

not of major significance in forming the attitudes of other countries with regard to capital punishment, or that the same judgment would be made if these nations had a comparable homicide rate? An additional difficulty of this kind arises with particular regard to the present issue of murders by juveniles: it has never been shown that similar problems exist in other countries, and some suggestion appears to the contrary.[34] If there is reliable objective evidence which establishes a consensus in the United States against the execution of sixteen-year-olds who commit a capital homicide, no need arises to examine the positions taken by other countries on the basis of their own national experiences. If no such consensus can otherwise be established, respondent submits that it cannot be shown by the stand taken on this issue by the legislative bodies of other nations. See *Thompson v. Oklahoma, supra,* 108 S.Ct. at 2716-2717 (n. 4) (dissent).

4. Treaties

Some forty years ago, the United States signed and ratified a treaty providing that persons under military occupation in time of war should not be sentenced to death for offenses committed under age eighteen. Geneva Convention Relative to the Protection of Civilian Prisoners in Time of War, August 12, 1949, 6 U.S.T. 3516, 3560. Significantly, this prohibition applied only to certain foreign nationals in the hands of belligerents—signatories were free to execute others, as well as their own

34. "[I]n contrast to the pattern in the United States, the increase in crime found so prominently among the young people in Europe seems to have been concentrated among young adults between eighteen to twenty-five years of age instead of youths under eighteen." Ferdinand, "Crime Statistics: Historical Trends in Western Society," 1 Encyclopedia of Criminal Justice 392, 399 (1983).

citizens, without regard to age (*Id.* at 3520)—and the treaty governed only during a war or occupation (*Id.* at 3522).

Although this treaty has been cited as supporting petitioner's position, *Thompson v. Oklahoma, supra,* 108 S.Ct. at 2707-2708 (concurrence), respondent fails to perceive why. Even if the United States were currently at war, every youthful murderer now under a sentence of death in this country, including petitioner, could be executed under the terms of this agreement. The treaty even permits the execution of the citizens of co-belligerents or neutrals without regard to age in some circumstances. 6 U.S.T. at 3520. In short, this treaty cannot reasonably be construed as expressing a view that persons under eighteen should never be punished by death for their crimes, but only that this should not be done in foreign territory forcibly occupied by a country at war. The distinction thus made is perfectly reasonable and utterly irrelevant to the issue before this Court.

Even greater difficulties attend efforts to rely upon treaties which the United States Senate has declined to ratify. Like any other form of legislation, the sole relevance of a treaty to the issue of "evolving standards of decency" is that it has been approved by the elected representatives of the people, who presumably did so in reflection of public views. *Gregg v. Georgia, supra* at 175-176. Absent any such approval, these agreements are at least irrelevant and at most evidence that no national consensus exists on the present issue.[35]

35. Since the issue was not pressed or passed on below and is beyond the scope of this Court's grant of certiorari, respondent will forbear to address the legal gymnastics performed by some amici curiae in arguing that this Court is powerless to uphold petitioner's sentence because the United States is bound by treaties it has not ratified. *Amicus curiae* brief of International Human Rights Law Group at 36-42. See Article II, Section 2 of the United States Constitution.

III. The Execution of Sixteen-Year-Olds Who Have Committed a Capital Homicide Serves the Same Penological Goals as the Execution of Murderers of Any Older Age

Past decisions of this Court have indicated that, even when a particular punishment is accepted by society, it may nevertheless violate the Eighth Amendment because it is "grossly out of proportion to the severity of the crime." *Gregg v. Georgia, supra* at 173; see also *Enmund v. Florida, supra* at 788; and *Solem v. Helm,* 463 U.S. 277, 286-288 (1983). In this respect, it would appear, "it is for [this Court] ultimately to judge" whether a given penalty or class of penalties is contrary to Eighth Amendment guarantees as applied to the states through the Fourteenth Amendment. *Enmund v. Florida, supra* at 797. Past applications of this principle to capital punishment have involved classes of crimes or defendants for which, it was held, a sentence of death was never appropriate whatever the facts of any given case: non-homicide offenses, *Coker v. Georgia, supra;* defendants without an intent to kill, *Enmund v. Florida, supra;* and inmates who are insane at the time of execution, *Ford v. Wainwright, supra.* As did the plurality in *Thompson,* petitioner seeks to apply the same proportionality principles to a class concerning which the above argument cannot plausibly be made: those individuals guilty of an intentional murder who happen to have been no older than sixteen years and 364 days when they committed their crime.

No better evidence of the indefensibility of petitioner's position can be found than in the arguments presented and authorities cited in his brief. Petitioner does not even attempt to claim that he has isolated some mental processes or characteristics which are unique to those with a chronological age between sixteen and seventeen, nor has any evidence been offered that sixteen-year-olds are mentally

uniform as a class.[36] Instead, petitioner contents himself with vague generalizations about the purported thoughts of "normal adolescents" (Pet.Br. 37) and "juveniles" (Pet. Br. 38), without any effort to establish what must be shown to support his theory of proportionality: that sixteen-year-olds inherently have no understanding of the consequences of any of their actions, that none have the capacity to appreciate death, that they are incapable of acting other than impulsively, and the assortment of other theories advanced to distinguish these individuals on the basis of their chronological age.

The obvious fact that petitioner's assumption is untrue—that youths do not acquire a higher level of maturity on each succeeding birthday, in the manner of a snake shedding its skin—has been acknowledged by many authorities, including members of this Court. As stated, for example, by *The President's Commission on Law Enforcement and Administration of Justice, Task Force Report: Juvenile Delinquency and Youth Crime* (1967),

> "It is recognized that some youths handled by juvenile courts are hardened, dangerous offenders, while some adults older than the arbitrary upper age are emotionally and sometimes physically immature individuals . . . .
>
> * * *
>
> No chronological age bracket is uniformly identical or entirely homogenous." *Id.* at 119-120.

See also *Fare v. Michael C.,* 442 U.S. 707, 734 (n. 4)

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36. This argument is also contradicted by the amici curiae who support the position of petitioner. Aside from the fact that all amici propose a dividing line of age eighteen, in accordance with the position of *High v. Zant,* No. 87-5666, some make a point of noting that "[m]any of the psychological and emotional changes that an adolescent experiences in maturing do not actually occur until the early 20s" (footnote omitted). *Amicus curiae* brief of the American Society for Adolescent Psychiatry, *et al.,* at 4.

(1979) (Powell, J., dissenting); and *Hill, supra*, 20 Crim. Law Bull. at 26 ("chronological age is an inherently poor criterion by which to determine actual maturity"). Because of this fact, petitioner's argument is not merely unsupported by this Court's past "proportionality" decisions, but actually promotes the infliction of capital punishment in an arbitrary and freakish fashion. *Gregg v. Georgia, supra* at 188-189. The decisions of this Court from *Gregg* onward have emphasized the importance of individualized consideration of each crime and offender based upon a broad range of evidence, to allow the sentencer "to consider a myriad of factors to determine whether death is the appropriate punishment." *California v. Ramos*, 463 U.S. 992, 1008 (1983). In particular, juries should be free to assess punishment according to the personal culpability of the defendant before them. *Thompson v. Oklahoma, supra*, 108 S.Ct. at 2698 (plurality). Yet attempts to deal with sixteen-year-old killers "as a class" (*Id.*) while ignoring the absence of any uniform chronological age of maturity for individuals, thwarts these objectives: especially culpable murderers may be categorically excluded from consideration for the death penalty, while less blameworthy defendants may be eligible for this punishment, for no other reason than a difference of days or months in their dates of birth.[37]

37. This potential for injustice multiplies in crimes involving two or more defendants of different ages. A notorious example in England in the 1950's involved the conviction of sixteen-year-old Christopher Craig and nineteen-year-old Derek Bentley for the murder of a police officer. Because of a law prohibiting the execution of persons under eighteen, Craig was spared this punishment while Bentley was sentenced to death and executed, despite the fact that Craig had personally committed the killing and Bentley was in custody at the time of the officer's death. J. Christoph, *Capital Punishment and British Politics* 98-100 (1962). This case, and the conceptual difficulties in the arbitrary age distinction proposed by petitioner, are discussed at length in Hoffman, "On the Perils of Line-Drawing: Juveniles and the Death Penalty," to be published in 40 Hastings L.J., Issue 2, in January of 1989.

A particularly piquant irony in petitioner's "proportionality" analysis involves the companion case of *High v. Zant*, No. 87-5666. In *High*, as in the case at bar, extensive argument is offered that High's conduct demonstrates why this Court should establish as a constitutional principle that capital punishment is always disproportionate for those who kill at age seventeen even though permissible at age eighteen or above. Long-distance evaluations are offered of petitioner High by psychological groups appearing as amici curiae which purport to justify this distinction. *Amicus curiae* brief of the American Society for Adolescent Psychiatry, *et al.*, at 16-17. Subsequently, however, evidence has been developed and filed by motion with this Court indicating that High may actually have been *nineteen* years of age when he committed the murder for which he was sentenced to death. Whatever High's actual age may turn out to be, the fact that petitioner would condition the "proportionality" of High's sentence of death solely upon which account one believes regarding his date of birth is ample refutation of his position.

If any response were necessary to the shibboleths offered by petitioner regarding the thought processes of "juveniles," it is supplied by the facts of the present case. Petitioner categorically asserts that the principle of retribution has no application to sixteen-year-old murderers because they act "impulsively" and out of an inability to control their emotions, and are therefore less culpable. Pet.Br. 36-38; *see also Thompson v. Oklahoma, supra*, 108 S.Ct. at 2699 (plurality). Yet petitioner's murder of Nancy Allen was neither impulsive nor emotional: he had planned to kill any and all witnesses to his robbery "a week or two" before he committed that crime (Tr. 126, 128, 219-220, 227). The statement by petitioner and the plurality in *Thompson* that those who kill at

age sixteen do not undertake the kind of risk-benefit analysis that would be relevant to the principle of deterrence in capital punishment, Pet.Br. 40-41; *Thompson v. Oklahoma, supra,* 108 S.Ct. at 2700, is contradicted by evidence in the present case of a perfectly rational, if depraved and callous, risk-benefit analysis conducted by petitioner:

"Q. Why did you feel you had to stab someone? Why did you do that?

A. No witnesses.

Q. No witnesses. What do you mean, no witnesses?

A. A dead person can't talk.

Q. That's why you—

A. And identify you.

Q. They can't identify you and that's why you did it?

A. Uh huh" (Tr. 127-128).

By his own account, petitioner decided in advance to commit murder in an attempt to evade punishment for robbery "if I got caught" (Tr. 128). This was not "risk-taking behavior" (Pet.Br. 37) but in fact an attempt to minimize risk. On its face, petitioner's testimony before the state Circuit Court refutes the claim that he did not contemplate the consequences of his actions or anticipate that he might be caught and punished (Pet.Br. 41).

The underlying theme of petitioner's brief appears to be that the very existence of juvenile courts signifies a judgment by society that juveniles are not fully responsible for their actions and should not suffer the same consequences as adults for their criminal acts (Pet.Br. 26-27). The obvious response, unaddressed by petitioner, is that every jurisdiction provides for circumstances in which juveniles may be criminally prosecuted as adults, and that this reflects a view that these

persons *may be* equally culpable in some circumstances. When such culpability is found, as in the case at bar, no basis exists to claim that capital punishment does not serve the same legitimate penological goals attributed to it in all other cases.

IV. Petitioner May Not Present Additional Claims to This Court Which Were Not Pressed or Passed Upon Below or Which Are Not Fairly Included Within This Court's Limited Grant of Certiorari

Petitioner's petition for a writ of certiorari was granted by this Court "limited to Question 1 presented by the petition." *Wilkins v. Missouri,* ..... U.S. ....., 108 S.Ct. 2896, 101 L.Ed.2d 930 (1988). This Question Presented was "Whether the infliction of the death penalty on a child who was sixteen at the time of the crime constitutes cruel and unusual punishment under the Eighth and Fourteenth Amendments to the Constitution of the United States." Petition for a Writ of Certiorari at 3. Ignoring the above order, petitioner now advances three additional and distinguishable issues, none of which appeared in his certiorari petition and at least one of which has never been presented to any state court (Pet.Br. 43-49). This Court has generally declined to review claims beyond the scope of a grant of certiorari, see *Tison v. Arizona, supra,* 107 S.Ct. at 1682 (n. 2), and particularly so when the issue raised was not "pressed or passed upon" in the state courts below. *Heath v. Alabama,* 474 U.S. 82, 86-87 (1985); *Illinois v. Gates,* 462 U.S. 213, 217-224 (1983). The issues improperly advanced by petitioner are briefly summarized below.

A. Petitioner's Attack Upon His Juvenile Transfer

For the first time in this Court, petitioner alleges that his certification for trial as an adult under the provisions

of Mo.Rev.Stat. §211.071 (1986) (Respondent's Appendix A) was invalid because the juvenile court purportedly did not make an "individualized consideration" of petitioner's maturity and responsibility (Pet.Br. 43-45).[38] Since petitioner did not bestir himself to offer this contention to the Missouri Supreme Court, the transcript of petitioner's juvenile certification hearing is not part of the record on appeal.

Even if the absent record were to bear out petitioner's factual assertions, and if this Court were to overlook its "longstanding rule" against considering claims not pressed or passed upon below, *Heath v. Alabama, supra,* respondent fails to perceive how the constitutionally-required principle of "individualized consideration" of capital defendants (Pet.Br. 43) has any possible relevance to a proceeding in which neither petitioner's guilt nor his punishment were determined. As the evidence shows (Tr. 194-301), and as the Missouri Supreme Court found, petitioner did receive such consideration in his punishment phase hearing as well as in the Supreme Court's proportionality review. *State v. Wilkins, supra* at 415-417 (J.A. 89-94).

B. Petitioner's Attack Upon His Sentencing

Under Missouri capital sentencing procedure, taken from the Georgia law upheld in *Gregg v. Georgia, supra,* the only written finding required to be made by the trier

38. *But see* J.A. 5, in which the juvenile court made specific reference to petitioner's maturity. In the course of this argument, petitioner makes the astoundingly frivolous assertion that "[o]nce transferred to the courts of general jurisdiction, Heath Wilkins' age was irrelevant to the imposition and affirmance of his death sentence" (Pet.Br. 43-44). See Mo.Rev.Stat. §565.032.3(7) (1986) and *State v. Wilkins,* 736 S.W.2d 409, 415 (Mo. banc 1987) (J.A. 89-90), which state expressly to the contrary.

of punishment is an indication of the statutory aggravating circumstances found. Mo.Rev.Stat. §565.030.4 (1986). The Circuit Court in the present case made the required written finding and stated that "after considering all other proper and lawful matters" a sentence of death should be imposed upon petitioner (J.A. 77). On appeal to the Missouri Supreme Court, petitioner claimed that because the court had not expressly stated that he had considered mitigating circumstances, such circumstances had not been considered. The Missouri Supreme Court flatly rejected this allegation, noting in part that the Circuit Judge's report prepared pursuant to Mo.Rev.Stat. §565.035.1 (1986) specifically indicated the consideration of mitigating factors. *State v. Wilkins, supra* at 415-416 (J.A. 89-90).[39] Ignoring this ruling, and without even having advanced the present claim in his certiorari petition, petitioner restates the same discredited allegation in his brief and asserts that the court sentenced him to death merely because he asked for that penalty (Pet.Br. 30-31, 46-47).

Petitioner's obvious (though unacknowledged) analogy is to *Eddings v. Oklahoma, supra,* in which this Court granted review on the identical issue properly presented in this case but ruled on a claim not raised, that the sentencer had declined to consider the petitioner's violent background as a mitigating factor. *Id.* at 120 (Burger, C.J., dissenting). The procedural aspects of that case aside, *Eddings* involved an *affirmative statement* by the sentencing judge that he could not consider certain mitigating evidence, *Id.* at 109, 112-115, whereas the present record contains affirmative evidence that the court considered available mitigating circumstances, as well as a state court finding to that effect.

39. The report of the Circuit Court is part of the certified record on appeal before this Court.

C. Petitioner's Attack Upon His Appellate Review

Finally, petitioner flatly misrepresents the Supreme Court of Missouri as holding that "his age at the time of the offense was irrelevant" (Pet.Br. 47). Not only is no such holding suggested by that court's opinion, in which petitioner's age as a possible mitigating factor was expressly discussed, *State v. Wilkins, supra* at 415-416 (J.A. 89-91), but three justices were so swayed by petitioner's age and related factors as to recommend a reduction of sentence. *Id.* at 417-423 (J.A. 95-106). Accordingly, respondent submits, petitioner's attempt to exceed the proper scope of review in this cause should be rejected.

CONCLUSION

In view of the foregoing, the respondent submits that the decision of the Supreme Court of Missouri should be affirmed.

Respectfully submitted,

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APPENDIX A

Mo.Rev.Stat. §211.071 (1986), states as follows:

> *"Certification of juvenile for trial as adult—procedure—misrepresentation of age, effect.*—1. If a petition alleges that a child between the ages of fourteen and seventeen has committed an offense which would be considered a felony if committed by an adult, the court may, upon its own motion or upon motion by the juvenile officer, the child or the child's custodian, order a hearing and may, in its discretion, dismiss the petition and such child may be transferred to the court of general jurisdiction and prosecuted under the general law.
>
> 2. Upon apprehension and arrest, jurisdiction over the criminal offense allegedly committed by any person between seventeen and twenty-one years of age over whom the juvenile court has retained continuing jurisdiction shall automatically terminate and that offense shall be dealt with in the court of general jurisdiction as provided in section 211.031.
>
> 3. Knowing and willful age misrepresentation by a juvenile subject shall not affect any action or proceeding which occurs based upon the misrepresentation. Any evidence obtained during the period of time in which a child misrepresents his age may be used against the child and will be subject only to rules of evidence applicable in adult proceedings.
>
> 4. Written notification of a transfer hearing shall be given to the juvenile and his custodian in the same manner as provided in sections 211.101 and

211.111. Notice of the hearing may be waived by the custodian. Notice shall contain a statement that the purpose of the hearing is to determine whether the child is a proper subject to be dealt with under the provisions of this chapter, and that if the court finds that the child is not a proper subject to be dealt with under the provisions of this chapter, the petition will be dismissed to allow for prosecution of the child under the general law.

5. The juvenile officer may consult with the office of prosecuting attorney concerning any offense for which the child could be certified as an adult under this section. The prosecuting attorney shall not divulge any information regarding the child and the offense until the juvenile court at a judicial hearing has determined that the child is not a proper subject to be dealt with under the provisions of this chapter.

6. A written report shall be prepared in accordance with this chapter developing fully all available information relevant to the criteria which shall be considered by the court in determining whether the child is a proper subject to be dealt with under the provisions of this chapter and whether there are reasonable prospects of rehabilitation with the juvenile justice system. These criteria shall include but not be limited to:

(1) The seriousness of the offense alleged and whether the protection of the community requires transfer to the court of general jurisdiction;

(2) Whether the offense alleged involved viciousness, force and violence;

(3) Whether the offense alleged was against persons or property with greater weight being given to the offense against persons, especially if personal injury resulted;

(4) Whether the offense alleged is a part of a repetitive pattern of offenses which indicates that the child may be beyond rehabilitation under the juvenile code;

(5) The record and history of the child, including experience with the juvenile justice system, other courts, supervision, commitments to juvenile institutions and other placements;

(6) The sophistication and maturity of the child as determined by consideration of his home and environmental situation, emotional condition and pattern of living;

(7) The program and facilities available to the juvenile court in considering disposition; and

(8) Whether or not the child can benefit from the treatment or rehabilitative programs available to the juvenile court.

7. If the court dismisses the petition to permit the child to be prosecuted under the general law, the court shall enter a dismissal order containing:

(1) Findings showing that the court had jurisdiction of the cause and of the parties;

(2) Findings showing that the child was represented by counsel;

(3) Findings showing that the hearing was held in the presence of the child and his counsel; and

(4) Findings showing the reasons underlying the court's decision to transfer jurisdiction.

8. A copy of the petition and order of the dismissal shall be sent to the prosecuting attorney.

9. When a petition has been dismissed thereby permitting a child to be prosecuted under the general law, and the subject has been convicted in the court of general jurisdiction, the jurisdiction of the juvenile court over that child is forever terminated for an act that would be a violation of a state law or municipal ordinance.

10. If the court does not dismiss the petition to permit the child to be prosecuted under the general law, it shall set a date for the hearing upon the petition as provided in section 211.171."

Mo.Rev.Stat. §565.020 (1986), states as follows:

> *"First degree murder, penalty.*—1. A person commits the crime of murder in the first degree if he knowingly causes the death of another person after deliberation upon the matter.
>
> 2. Murder in the first degree is a class A felony, except that the punishment shall be either death or imprisonment for life without eligibility for probation or parole, or release except by act of the governor."

APPENDIX B

STATE LAWS REGARDING THE MINIMUM AGE AT WHICH A DEFENDANT MAY BE SENTENCED TO DEATH

No Age Specified

ARIZONA: Ariz.Rev.Stat.Ann. §8-202 (1974); and Arizona Rules of Procedure for Juvenile Court, Rules 12 and 14.

DELAWARE: 10 Del.Code Ann. §938(a)(1) (1975); and 11 Del.Code Ann. §§636 and 4209 (Repl. 1987).[1]

FLORIDA: Fla.Stat.Ann. §39.02(5)(c)(1) (Supp. 1988).[2, 3]

OKLAHOMA: 10 Okla.Stat.Ann. §§1104.2 and 1112(b) (1987) (age 16 specified for murder, but may be prosecuted at younger age through juvenile certification process).[3]

SOUTH CAROLINA: S.C.Code Ann. §20-7-430(6) (1985).[1]

WYOMING: Wyo.Stat. §14-6-237 (1986).

Age 10

SOUTH DAKOTA: S.D. Codified Laws Ann. §§26-8-7 and 26-11-4 (1984).

Age 12

MONTANA: Mont.Code Ann. §§41-5-206(1)(a)(i) and §45-5-102 (1987).[1]

Age 13

MISSISSIPPI: Miss.Code Ann. §43-21-151(3) (Supp. 1987).[3]

Age 14

ALABAMA: Ala.Code §12-15-34(a) (Repl. 1982).[3]

IDAHO: Idaho Code §16-1806(1)(a) (Supp. 1988).

MISSOURI: Mo.Rev.Stat. §211.071.1 (1986).[3]

NORTH CAROLINA: N.C.Gen.Stat. §§7A-608 and 14-17 (Supp. 1987) (age minimum 17 except in designated circumstances).[4, 5]

PENNSYLVANIA: 42 Pa.Cons.Stat.Ann. §6355(a)(1) (1982).[3]

UTAH: Utah Code Ann. §78-3a-25(1) (1987).

Age 15

ARKANSAS: Ark.Code Ann. §§5-1-116(b) and 5-10-101 (1987).[3]

LOUISIANA: La.Rev.Stat.Ann. §§14:30 and 13:1570(A)(5) (1986).[1, 3]

VIRGINIA: Va.Code Ann. §16.1-269(A) (Repl. 1988).

Age 16

INDIANA: Ind.Code Ann. §35-50-2-3(b) (Supp. 1988).[4, 5]

KENTUCKY: Ky.Rev.Stat.Ann. §640.040(1) (Supp. 1987).[4, 5]

NEVADA: Nev.Rev.Stat. §176.025 (1987).[3, 5]

WASHINGTON: Wash.Rev.Code §§9A.32.030(2), 10.95.020 and 13.40.110(1)(a) (1988 and Supp. 1988).

Age 17

GEORGIA: Ga.Code Ann. §17-9-3 (1982).[5]

NEW HAMPSHIRE: N.H.Rev.Stat.Ann. §§21-B:1, 630.1(V) and 630.5 (XIII) (1986 and Supp. 1987) (appearing to set both 17 and 18 as minimum ages).[5]

TEXAS: Tex.Penal Code Ann. §8.07(d) (Supp. 1988).[5]

Age 18

CALIFORNIA: Cal.Penal Code §190.5 (West. 1988).[5]

COLORADO: Col.Rev.Stat. §16-11-103(1)(a) (Repl. 1986).[5]

CONNECTICUT: Conn.Gen.Stat.Ann. §53a-46a(g)(1) (1987).[5]

ILLINOIS: 38 Ill.Ann.Stat., par. 9-1(b) (Supp. 1988).[5]

MARYLAND: 27 Md.Code §412(f) (Repl. 1988).[5]

NEBRASKA: Nebr.Rev.Stat. §28-105.01 (1985).[5]

NEW JERSEY: N.J.Stat.Ann. §§2A:4A-22(a) and 2C:11-3(g) (Repl. 1987 and Supp. 1988).[5]

NEW MEXICO: N.M.Stat.Ann. §§28-6-1(A) and 31-18-14(A) (Repl. 1987).[5]

OHIO: Ohio Rev.Code Ann. §2929.02(A) (1986).[5]

OREGON: Ore.Rev.Stat. §§161.620 and 419.476(1) (1987).[5]

TENNESSEE: Tenn.Code Ann. §§37-1-102(3) and 37-1-134(a)(1)

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1. Specific reference made in juvenile transfer statute to capital offense.

2. Specific reference made in juvenile transfer statute to sentence of death.

3. At least one person under sentence of death between 1981 and 1987 for murder committed at age sixteen or younger.

4. Minimum age for execution raised after person of lesser age sentenced to death.

5. Minimum age for execution stated in death penalty statute.

NOTE: The State of Vermont is not listed because it no longer has a death penalty for homicide. 13 Vt.Stat.Ann. §2303(a) (Cum.Supp. 1988).

APPENDIX C

STATE LAWS WHICH EXPRESSLY DESIGNATE THE DEFENDANT'S AGE AS A MITIGATING FACTOR IN CAPITAL CASES

ALABAMA: Ala.Code. §13A-5-51(7) (Repl. 1982).

ARIZONA: Ariz.Rev.Stat.Ann. §13-703(G)(5) (Supp. 1987).

ARKANSAS: Ark.Code Ann. §5-4-605(4) (1987).

CALIFORNIA: Cal.Penal Code §190.05(h)(9) (West 1988).

COLORADO: Col.Rev.Stat. §16-11-103(5)(a) (Repl. 1986).

CONNECTICUT: Conn.Gen.Stat.Ann. §53a-46(a)(g)(1) (1987).

FLORIDA: Fla.Stat.Ann. §921.141(6)(g) (1985).

INDIANA: Ind.Code Ann. §35-50-2-9(c)(7) (Cum. Supp. 1988).

KENTUCKY: Ky.Rev.Stat.Ann. §532.025(2)(b)(8) (Cum.Supp. 1988).

LOUISIANA: La.Code Crim.Proc., art. 905.5(f) (1984).

MARYLAND: 27 Md.Code §413(g)(5) (Repl. 1988).

MISSISSIPPI: Miss.Code Ann. §99-19-101(6)(g) (Cum. Supp. 1987).

MISSOURI: Mo.Rev.Stat. §565.032.3(7) (1986).

MONTANA: Mont.Code Ann. §46-18-304(7) (1987).

NEBRASKA: Nebr.Rev.Stat. §29-2523(2)(d) (1985).

NEVADA: Nev.Rev.Stat. §200.035.6 (1987).

NEW HAMPSHIRE: N.H.Rev.Stat.Ann. §630.5(II)(b)(5) (1986).

NEW JERSEY: N.J.Stat.Ann. §2C:11-3(c)(5)(c) (Supp. 1988).

NEW MEXICO: N.M.Stat.Ann. §31-20A-6(I) (Repl. 1987).

NORTH CAROLINA: N.C.Gen.Stat. §15A-2000(f)(7) (Supp. 1987).

OHIO: Ohio Rev.Code Ann. §2929.04(B)(4) (1986).

OREGON: Ore.Rev.Stat. §163.150(1)(b)(B) (Supp. 1988).

PENNSYLVANIA: 42 Pa.Cons.Stat.Ann. §9711(e)(4) (1982).

SOUTH CAROLINA: S.C.Code Ann. §16-3-20(C)(b)(7, 9) (Supp. 1987).

TENNESSEE: Tenn.Code Ann. §32-2-203(j)(7) (1982).

UTAH: Utah Code Ann. §76-3-207(2)(e) (Supp. 1988).

VIRGINIA: Va.Code Ann. §19.2-264.4(B)(v) (Repl. 1983).

WASHINGTON: Wash.Rev.Code §10.95.070(7) (Cum. Supp. 1988).

WYOMING: Wyo.Stat. §6-2-102(j)(vii) (1988).